

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

R. ALEXANDER ACOSTA,
Secretary of Labor, United States
Department of Labor,

Petitioner,

v.

CHERRY HOME ORCHARDS, LLC,

Respondent.

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Case No.

**SECRETARY OF LABOR’S PETITION TO ENFORCE
ADMINISTRATIVE SUBPOENA *DUCES TECUM***

Petitioner **R. ALEXANDER ACOSTA**, Secretary of Labor, United States Department of Labor (“the Secretary”) hereby alleges:

JURISDICTION AND VENUE

1. This Petition is brought to compel Respondent **CHERRY HOME ORCHARDS, LLC** (“Respondent”) to comply with an Administrative Subpoena *Duces Tecum* issued by the Regional Director of the Cincinnati Regional Office of the Employee Benefits Security Administration (“EBSA”) of the United States Department of Labor in an investigation conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1134.

2. This Court has subject matter jurisdiction over this Petition pursuant to Sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. §§ 49 and 50, as made applicable to ERISA by Sections 504(c) and 502(e)(1) of ERISA, 29 U.S.C. §§ 1134(c) and 1132(e)(1).

3. Respondent is a limited liability company with a place of business at 7271 North West Bayshore Drive, Northport, Michigan 49670, within the jurisdiction of this Court. Exhibit

1 at ¶ 5 (attached hereto and made a part hereof) and Exhibit 2 (attached hereto and made a part hereof).

4. Brian Mitchell (“Mitchell”) is the sole owner and principal of Respondent. Exhibit 1 at ¶ 7.

5. Mitchell resides at 7444 North Swede Road, Northport, Michigan 49670, within the jurisdiction of this court. *Id.* Respondent’s mail is delivered to Mitchell at his residence. *Id.*; Exhibit 3 (attached hereto and made a part hereof).

6. Respondent sponsors the Cherry Home Orchards, LLC 401(k) Plan (“Plan”) (see Exhibit 2, Box 2a), which is the subject of an EBSA investigation pursuant to ERISA § 504(a), 29 U.S.C. § 1134(a). Exhibit 4 (attached hereto and made a part hereof).

7. The Plan is administered at 7271 North West Bayshore Drive, Northport, Michigan 49670, according to the IRS Form 5500—Annual Return/Report as Plan Administrator, within the jurisdiction of this Court. Exhibit 2, Box 3a.

8. Venue lies in the Western District of Michigan, Southern Division, pursuant to 15 U.S.C. § 49 and 28 U.S.C. § 1391(b)(1) because the Respondent is located in this judicial district and the Plan is administered in this judicial district. *Id.*

THE INVESTIGATION AND SUBPOENA

9. At all times relevant hereto, EBSA has been conducting an investigation of the Plan under ERISA § 504(a)(1), 29 U.S.C. § 1134(a)(1), to determine whether any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order promulgated thereunder. Exhibit 1 at ¶ 3; Exhibit 4 (attached hereto and made a part hereof).

10. In the course of its investigation, EBSA determined that obtaining certain information from Respondent was essential and necessary to determine whether any ERISA violations occurred or were about to occur. Exhibit 1 at ¶ 6.

11. On May 4, 2018, L. Joe Rivers, Cincinnati Regional Director of EBSA (“Regional Director Rivers”) issued an appointment letter to the Plan Administrator, indicating that EBSA

was conducting its investigation of the Plan and attaching a “List of Documents Required for Examination” of the Plan to be made available to Auditor Brubaker on May 29, 2018. Exhibit 1 at ¶ 4; Exhibit 4.

12. On June 27, 2018, L. Joe Rivers, Cincinnati Regional Director of EBSA, pursuant to authority vested by ERISA § 504(c), 29 U.S.C. § 1134(c), issued an Administrative Subpoena *Duces Tecum* (“Subpoena”) directed to Respondent. Exhibit 1 at ¶ 9; Exhibit 5 (attached hereto and made a part hereof).

13. EBSA served the Subpoena to Respondent at 7444 N. Swede Road, Northport, Michigan 49670 by United Parcel Service—Signature required, on July 3, 2018. Exhibit 1 at ¶ 11; Exhibit 5. The Subpoena required Respondent to produce responsive documents by July 12, 2018. Exhibit 1 at ¶ 10; Exhibit 5 at 3.

14. On July 3, 2018, United Parcel Service emailed delivery notification to EBSA Auditor Karl Brubaker. Exhibit 1 at ¶ 11; Exhibit 6 (attached hereto and made a part hereof). The delivery notification indicated that the Subpoena was signed for by “Mitchell.” *Id.*

RESPONDENT’S FAILURE TO COMPLY WITH THE SUBPOENA

15. Respondent failed to respond to the Subpoena by the July 12, 2018 deadline. Exhibit 1 at ¶ 15.

16. Respondent promised to provide some documents to EBSA on July 11, July 12, and July 13, 2018. Exhibit 1 ¶ 13-14 and 16-17.

17. On July 17, 2018, Respondent produced some Plan statements for 2014 and 2015, but not the documents required by the Subpoena. Exhibit 1 ¶ 20 and 36.

18. EBSA Auditor Karl Brubaker (“Auditor Brubaker”) sought compliance with the Subpoena by making at least 38 attempts to contact Respondent by telephone and e-mails between July 10, 2018 and January 3, 2019. Exhibit 1 at ¶ 12-32; Exhibit 7 (attached hereto and made a part hereof).

19. On August 10, 2018, Ruben R. Chapa, ERISA Counsel for the U.S. Department of Labor, Office of the Solicitor, sent a letter by United States Postal Service Certified Mail stating if Respondent did not comply with the Subpoena by August 17, 2018, the Secretary may seek to file an action in federal district court to enforce the Subpoena. Exhibit 1 at ¶ 25; Exhibit 7 (attached hereto and made a part hereof).

20. On September 17, 2018, Respondent produced a spreadsheet of 2015 distributions with no payroll details. Exhibit 1 at ¶ 29.

21. On September 21, 2018, Respondent produced two spreadsheets to show payroll deferrals for some dates in 2015 and 2017 with insufficient details to determine the dates and amounts of deferrals, or the employees making the deferrals. *Id.* at ¶ 31. Respondent also produced a spreadsheet showing annual withholdings by participant in 2017 with no detail by pay dates. *Id.*

22. On January 14, 2019, EBSA referred the matter to the U.S. Department of Labor, Office of the Solicitor for Subpoena enforcement.

23. On January 31, 2019, Respondent produced 2018 Form W-2s for nonparticipants and a document titled “Master Control Register,” which included only nonparticipants, for the pay period ending August 18, 2018 and paycheck date of August 23, 2018. Exhibit 1 at ¶ 33.

24. EBSA attempted to obtain Plan records and documents directly from the Plan’s vendors, as well. Exhibit 1 at ¶ 34.

25. On March 19, 2019, Ruben R. Chapa, ERISA Counsel for the U.S. Department of Labor, Office of the Solicitor, sent a letter by United States Postal Service Certified Mail Return Receipt Requested and by United States Postal Service regular mail stating if Respondent did not comply with the Subpoena on or before March 28, 2019, the Secretary may file an action in federal district court to enforce the Subpoena. Exhibit 1 at ¶ 35; Exhibit 9 (attached hereto and made a part hereof).

26. To date, Respondent has failed to comply with the Subpoena because it has not provided all the following responsive documents to Subpoena Request (Exhibit 1 at ¶ 36):

<u>Request #</u>	<u>Document</u>
2.	Summary Annual Reports for 2014 and 2016;
3.	Fiduciary liability policy;
4.	Trust statements from May 7, 2018 to production;
4.	Most recent Participant account statements at date of production;
5.	Respondent's payroll registers and other documents showing participant contributions withheld from employees' pay, including payroll registers showing the individual and aggregate withholdings by pay date, from January 1, 2014 to date of production for periods when Respondent prepared payroll;
6.	Documents confirming the remittance and deposit of employee contributions to the Plan from January 1, 2018 to production;
7.	Communications to Plan participants regarding late and/or delinquent contributions;
9.	Documents confirming the remittance and deposit of Respondent matching contributions to the Plan, from January 1, 2018 to production;
12.	Communications among the Respondent, the Plan, Employee Fiduciary LLC, and Matrix Trust Company; and
13.	Respondent's bank account and investment account statements from January 1, 2014 to production.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner prays that this Court enter an order requiring Respondent CHERRY HOME ORCHARDS, LLC, to appear on a date certain to show cause, if any there be, why its representative should not appear before the designated EBSA representative at such time

and place as the Secretary or the Court may set, then and there to produce such designated documents and records as required by the Subpoena; and that the Petitioner have such other and further relief as may be necessary and appropriate.

Dated: March 29, 2019

KATE S. O'SCANNLAIN
Solicitor of Labor

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